

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

KEY DIFFERENCES: COUNTER-TERROR BILL AND EXISTING EMERGENCY LEGISLATION

<u>Existing Powers</u>	Counter-Terror Bill	<u>Amended Counter-Terror Bill</u>
<p>Trigger</p> <p>There would have to be a real emergency such as the kind of “nightmare scenario” the Government sometimes refers to (i.e. multiple grave terror plots involving so many arrests that the police simply cannot cope with less than 28 days pre-charge detention).ⁱ The Government would have to show that longer detention is urgently needed to deal with that emergency.</p>	<p>Trigger</p> <p>Although described as an “exceptional” “reserve power”, the Home Secretary can trigger the power to detain people for up to 42 days at any time, to deal with individual cases. There is no need for a public emergency.ⁱⁱ Neither would longer detention have to be needed to deal with that emergency.</p> <p>The only requirement is a report from the DPP and chief police officer stating that longer detention would assist their investigations.ⁱⁱⁱ</p>	<p>Trigger</p> <p>The legal tests that have to be met to trigger the 42 day power have not changed. The only requirement is still that the Home Secretary has received a report from the DPP and a chief police officer stating that longer detention would assist their investigations. The reason for the Home Secretary to trigger the power would still be to investigate individual cases rather than to prevent or control a possible emergency.</p> <p>Some of the language of emergency is included in the Bill but this does not provide any additional safeguard. Although a definition of “grave and exceptional terrorist threat” has been added, it would still be legal to trigger 42 days if there was</p>

		<p>no such threat.</p> <p>The only relevance of the language about a “grave and exceptional terrorist threat” is the fact that the Home Secretary has to tell Parliament that she is satisfied that such a threat exists. This statement does not, however, have any legal relevance and Parliament is not asked to vote on whether they agree that such a threat exists.</p>
<p><i>Parliament’s role</i></p> <p>Both Houses of Parliament must approve the emergency powers as soon as possible or in any event within seven days or they expire.^{iv}</p> <p>Parliament would not be debating individual cases but the existence and scale of an emergency.</p>	<p><i>Parliament’s role</i></p> <p>The Home Secretary only has to inform Parliament <i>after</i> she has triggered the 42 day limit.^v</p> <p>In general parliamentary approval is not needed and there would be no vote at all.^{vi}</p> <p>The scope for a meaningful debate would be very limited. If the powers are activated to deal with an individual case any debate could jeopardise any future prosecution.</p>	<p><i>Parliament’s role</i></p> <p>Parliamentary approval would now be required within 7 days. The scope for a meaningful debate would, however, still be very limited. Because the powers would still be activated to deal with an individual case any debate could jeopardise a future prosecution.</p> <p>The amendments do not ask Parliament to vote on whether or not there is a real emergency.</p> <p>The Home Secretary would still only have to inform Parliament <i>after</i> she has triggered the 42 day limit. She would now also have to notify the chairmen of the JCHR, HASC and Intelligence & Security Committee when she makes the order.</p>

<p>Legality</p> <p>The emergency powers can be challenged in the High Court and struck down if they are disproportionate, irrational or breach human rights.^{vii}</p>	<p>Legality</p> <p>The 42 day limit cannot be challenged in Court and the power could not be struck down.^{viii}</p>	<p>Legality</p> <p>The 42 day limit could still not be challenged in Court and the power could not be struck down.^{ix}</p> <p>The Home Secretary's order triggering the 42 day limit could, in theory, be challenged. It could not, however, be challenged on the grounds that: (a) there is no "grave and exceptional terrorist threat", (b) 42 days is not urgently needed; (c) the report from the DPP and chief police officer is inaccurate. Furthermore, it might not even be possible to challenge the order on human rights grounds.</p> <p>There is a new requirement for the Home Secretary to receive legal advice supporting her statement to Parliament. One would, however, expect such legal advice to be taken in any event and, in some circumstances, it would not need to be published.</p>
<p>Safeguards during use</p> <p>Safeguards would be contained in the emergency regulations or existing terror laws. The text of regulations could be agreed in advance.</p>	<p>Safeguards during use</p> <p>The Bill states that individual cases of detention beyond 28 days need DPP consent and each 7 day period must be approved by a senior judge.^x</p> <p>Report to Parliament each time extension is granted, excluding information that could prejudice a trial.^{xi}</p>	<p>Safeguards during use</p> <p>There is no change in the role of the judges in approving the use of the 42 day power in individual cases.</p> <p>Neither is there any change in the report to Parliament each time extension is granted, excluding information that could prejudice a trial.</p>

ⁱ “Emergency” is defined in Section 1 CCA 2004. Section 20 states that emergency regulations can only be made if the conditions in Section 21 are satisfied. The first condition in section 21 is that “an emergency has occurred, is occurring or is about to occur”. The second condition is that the emergency powers are necessary to prevent, control or mitigate an aspect or effect of the emergency. The third condition is that the emergency powers are needed urgently.

ⁱⁱ**NOTES:**

Counter-Terror Bill, Schedule 1, para 1, proposed para 40(1)

ⁱⁱⁱ Counter-Terror Bill, Schedule 1, para 1, proposed para 39

^{iv} CCA 2004, Section 27(1)(b)

^v Counter-Terror Bill, Schedule 1, para 1, proposed para 41

^{vi} Counter-Terror Bill, Schedule 1, para 1, proposed para 45

^{vii} This is because (1) emergency regulations under the CCA are secondary legislation; and (2) unlike under the Counter-Terror Bill, the CCA imposes meaningful legal limits on the powers to make emergency regulations.

^{viii} This is due to the fact that the power would be contained in primary legislation (the Counter-Terror Act 2007) rather than secondary legislation as under the CCA 2004

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^x Counter-Terror Bill, Schedule 1, para 1, proposed para 42

^{xi} Counter-Terror Bill, Schedule 1, para 1, proposed para 44